No. 14-981

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In The

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

THE UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF 823 SOCIAL SCIENTISTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

LILIANA M. GARCES
Counsel of Record
PENN STATE COLLEGE OF EDUCATION
400 Rackley Building
University Park, PA 16802
(814) 865-9754
lmg340@psu.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, the undersigned social scientists submit this brief as amici curiae in support of Respondents.[1]

Amici curiae are social scientists and scholars who have extensively studied diversity, race-conscious policies in education, desegregation, equity, and race relations in higher education institutions and in society. Collectively, amici curiae include 823 researchers from 44 states and from 237 educational institutions and research centers throughout the U.S. and D.C. Their work extends across numerous disciplines, including anthropology, demography, economics, education, history, political science, psychology, and sociology.[2]

As scholars, amici curiae have a particular interest in ensuring that the Court understands the social science research informing the legal issues in this case. To this end, we summarize research findings relevant to the educational judgments of

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[1] All parties have filed with the Court their blanket consent for the filing of amicus curiae briefs in this case. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] A list of amici is included in the Appendix. *See infra* App. 7-44. Institutional affiliation, including that for counsel of record, is provided for identification purposes only and does not reflect the views of the institution.

The University of Texas at Austin ("UT Austin"), and to the possible implications of the Court's decision for other institutions and programs. The brief draws from the amici's own research and their review of the literature, including the most extensive and up-to-date body of knowledge about the Texas Top Ten Percent Law ("the percent plan").

It is vital that the Court be informed by the newest and most rigorous peer-reviewed research and statistical analyses when considering an issue that is so critical for all of the nation's selective colleges and universities. We provide the Court with the most reliable social science evidence that bears directly on whether the Fifth Circuit faithfully applied the Court's standards in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), in concluding that UT Austin's admissions policy withstands strict scrutiny. This brief reflects a broad consensus shared by the hundreds of undersigned researchers at leading universities across the U.S. on the key issues before the Court.

SUMMARY OF ARGUMENT

Social science research strongly supports the Fifth Circuit's conclusion that the holistic consideration of race in admissions is a necessary complement to the percent plan for UT Austin to further its educational mission. UT Austin has a compelling interest in creating a meaningful level of inclusion of students from different racial groups and generating rich

diversity to dispel racial stereotypes and foster educational excellence.

A substantial body of rigorous social science research supports the Fifth Circuit's conclusion that the extensive outreach and recruitment efforts UT Austin implemented to obtain racial diversity under the percent plan, on their own, have not been sufficient complements to the percent plan to achieve UT Austin's educational mission. The claim that the percent plan is an effective alternative to a race-sensitive admissions policy relies on the Petitioner's effort to problematically lump African American and Latino students into a single category, concealing important differences related to the workability of the plan for each group. The percent plan, which relies on segregated school attendance patterns in the state, has not yielded the desired results at UT Austin. Whereas as a complement to the plan, the individualized consideration of race has enabled UT Austin to create a more stimulating and productive educational environment for all of its students.

UT Austin's experience with the percent plan and analyses based on statistical simulations for other states show that percent plans alone, even in states where secondary schooling is largely segregated by race (as it is in Texas), do not yield the level of diversity needed to obtain the educational benefits of diversity. Giving weight to socioeconomic status alone does not produce the diversity needed to further UT Austin's academic mission, and relying largely or solely on socioeconomic status to achieve diversity is

not a feasible alternative. The extensive experience of selective colleges and universities using alternatives to race-sensitive admissions decisions in other states, including California and Michigan, underscores the need for UT Austin's holistic policy. This evidence compels the conclusion that there are no effective substitutes for race-sensitive admissions decisions in generating the diversity required to further UT Austin's educational mission.

There are great costs in not considering race in admissions in the narrowly tailored manner that UT Austin employs. Research on the impact of laws that ban the consideration of race in admissions shows that at selective schools these bans have led to declines in racial and ethnic student body diversity, including in the important fields of medicine, law, business, and science. Not only do these declines degrade the educational experiences of students, but they harm the nation's future. Research shows that barring the kind of consideration that UT Austin gives race in its holistic admissions system cannot only isolate and stigmatize admitted students, but may also harm race relations by limiting cross campus racial integration and preventing institutions from addressing and countering the ways in which race shapes the educational experiences of all students.

ARGUMENT

I. The Fifth Circuit Correctly Concluded that UT Austin's Holistic Admissions Policy Is Necessary to Achieve the Compelling Educational Objective that the Court Endorsed in *Bakke*, *Grutter*, and *Fisher*

The Fifth Circuit's analysis properly concluded that UT Austin's holistic consideration of race is necessary to achieve student body diversity in the full sense recognized by the Court – that is, to assemble a student body with a "broa[d] array of qualifications and characteristics" who are diverse with respect to all the qualities valued by UT Austin. Pet. App. 115a (quoting *Fisher I*, 133 S. Ct. at 2418 (quoting *University of California v. Bakke*, 438 U.S. 265, 315 (1978))). UT Austin's goal is to promote the educational benefits that research conducted before and since the Court's ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), unequivocally documents. The association between campus diversity, both within and among racial groups, and educational benefits for students regardless of race is a consistent finding of social science research.[3]

A recent analysis of the concept of "critical mass" by researchers Garces and Jayakumar shows that having more than a small number of students of color on campus is necessary, but not sufficient, to create

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[3] Elizabeth Aries, *Race and Class Matters at an Elite College* 66 (2008).

the conditions that are needed to fully realize the educational benefits of diversity.[4] This study, which analyzes decades of diversity-related research, shows that to leverage the benefits of diversity, an institution must not just admit racially diverse students but must also promote a healthy racial climate, provide a welcoming environment for all students, prevent harms due to racial isolation, diminish feelings of tokenism, *and* promote cross-racial interactions.

A 2013 study by Park and colleagues demonstrates that having socioeconomic diversity within racial and ethnic groups facilitates interactions across race, which is critical for leveraging the educational benefits of diversity.[5] When African American and Latino students of diverse socioeconomic backgrounds are present, white students not only see the true diversity within African American and Latino student communities, but all students also experience more effective intergroup communication. The diversity of backgrounds by race and social class brings students together and deepens understanding in ways that might not otherwise exist, creating a more

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[4] Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 Educ. Researcher 115, 117-21 (2014).

[5] Julie J. Park et al., *Does Socioeconomic Diversity Make a Difference? Examining the Effects of Racial and Socioeconomic Diversity on the Campus Climate for Diversity*, 50 Am. Educ. Res. J. 466, 487-89 (2013).

fluid environment for cross-race interactions that benefits everyone.

When African American, Latino, and white students do not share some common experiences beyond their racial background, UT Austin is hampered in generating healthy cross-racial interactions and leveraging the educational benefits of diversity.[6] In particular, when African American and Latino students have mainly low-income backgrounds and may have experienced only segregated schooling, the social distance and lack of heterogeneity reinforce rather than disrupt stereotypes.

Moreover, a 2015 study by Jayakumar found that when white students do not interact with students from other racial groups in college, the lack of interaction can reinforce racially stigmatizing views developed prior to college.[7] In moving toward racially

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[6] *See* Uma M. Jayakumar, UCLA Higher Educ. Res. Inst., *Why Are All the Black Students* Still *Sitting Together in the Proverbial College Cafeteria?* 4-5 (2015), http://www.heri.ucla.edu/PDFs/Why-Are-All-the-Black-Students-Still-Sitting-Together-in-the-Proverbial-College-Cafeteria.pdf (revealing that same-race representation on campus is vital to ensuring quality cross-racial engagement).

[7] Uma M. Jayakumar, *The Shaping of Postcollege Color-blind Orientation Among Whites: Residential Segregation and Campus Diversity Experiences*, 85 Harv. Educ. Rev. (forthcoming Winter 2015). *See also* Jeffrey F. Milem et al., *Exploring the Perpetuation Hypothesis: The Role of Colleges and Universities in Desegregating Society*, 45 J.C. Student Dev. 688, 699 (2004) ("If we fail to engage students in diversity related initiatives and activities while in college, our students are likely to return to

(Continued on following page)

sensitive holistic admissions, UT Austin was working to overcome barriers to cross-racial engagement and the impediments of a negative climate for learning and participation, problems that become even more salient in the classroom.[8]

The diversity that UT Austin seeks to attain, including socioeconomic diversity within racial groups, is thus a compelling interest firmly rooted in the research on the educational benefits of student body diversity.

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the pre-college environments from which they came and that remain highly segregated.").

[8] *See* Patricia Gurin et al., *Dialogue Across Difference: Practice, Theory, and Research on Intergroup Dialogue* 82-86 (2013) (finding improved inter-ethnic relationships and reduction of stereotypes in diverse undergraduate classes); Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430, 432 (2006) (interactions with diverse peers in classrooms are important aspects of cross-racial interactions on campus); Victor B. Sáenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 Res. Higher Educ. 1, 35 (2007) (the college classroom is a critical context for increasing positive cross-racial interactions); Ximena Zúñiga et al., *Action-Oriented Democratic Outcomes: The Impact of Student Involvement with Campus Diversity*, 46 J.C. Student Dev. 660, 673 (2005) (engagement with diverse peers informally and in college classrooms is vital to reducing racial bias); Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 Fordham L. Rev. 3115, 3139 (2015) (documenting from the perspective of law faculty the importance of a rich range of perspectives in the classroom).

II. The Fifth Circuit Correctly Concluded that to Achieve Educationally Adequate Diversity UT Austin's Holistic Evaluation of Applicants Is a Necessary Complement to the Percent Plan

Empirical studies provide the foundation for the Fifth Circuit's conclusion that outreach and recruitment efforts, on their own, have not been sufficient complements to the percent plan for UT Austin to achieve its educational goals. The Court recognized in *Grutter* that percent plans are not by themselves effective substitutes for the flexible consideration of race, noting in particular the obstacles they create in "conducting the individualized assessments necessary to assemble a student body that is . . . diverse along all the qualities valued by the University." 539 U.S. at 340. By supplementing the percent plan with the holistic assessment of applicant characteristics, UT Austin seeks to offset the limits of a mechanistic standard that focuses on a single dimension (class rank) and has inadequate success in enrolling a student body sufficiently well rounded within as well as across races so as to maximize the educational benefits of a diverse campus.

A. The Fifth Circuit Correctly Concluded that Outreach and Recruitment Efforts Have Not Been Sufficient Complements to the Percent Plan

Following the implementation of the percent plan in Texas, a 2003 study by Horn and Flores showed

that the plan's potential to yield racial diversity depended on extensive outreach and recruitment efforts, including targeted financial aid for students.[9] And with the benefit of nine additional years of experience under the plan, in 2012 Horn and Flores found that, despite the implementation of a broad range of outreach and recruitment efforts, the enrollment patterns of students who qualify for admission under the plan have been unequal across racial groups. For instance, percent plan eligible white students have enrolled at the flagship institutions in the state at higher rates (60%) than percent plan eligible African Americans (36%) and Latino (47%) students.[10]

And the percent plan has been even less successful at Texas A&M, which does not consider race as a

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[9] Catherine L. Horn & Stella M. Flores, Civ. Rts. Project, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 52-53 (2003), http://civilrightsproject.ucla.edu/research/college-access/admissions/percent-plans-in-college-admissions-a-comparative-analysis-of-three-states2019-experiences.

[10] Catherine L. Horn & Stella M. Flores, *When Policy Opportunity Is Not Enough: College Access and Enrollment Patterns Among Texas Percent Plan Eligible Students*, 3 J. Applied Res. on Child. 1, 16-17 (2012). This finding is also supported by other analyses. *See, e.g.*, Mark C. Long & Marta Tienda, *Winners and Losers: Changes in Texas University Admissions Post*-Hopwood, 30 Educ. Evaluation & Pol'y Analysis 255, 266-67, 278 n.46 (2008).

factor in admissions, but does have the percent plan.[11] These findings support the educational necessity of being able to complement the percent plan with race-sensitive holistic review.

Outreach and recruitment efforts cannot fully address every reason why students may not apply to or enroll at UT Austin, including perceptions that students of color are not valued or welcome at the institution. Studies have shown that policies banning the consideration of race in admissions decisions can have a "discouragement effect" on minority students.[12] Recent work by Blume and Long suggests that even students in states nearby to those that have banned

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[11] Mexican Am. Legal Def. & Educ. Fund (MALDEF) et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After* Grutter *and* Gratz, 8 Harv. Latino L. Rev. 33, 36 (2005).

[12] *See* Lisa M. Dickson, *Does Ending Affirmative Action in College Admissions Lower the Percent of Minority Students Applying to College?*, 25 Econ. Educ. Rev. 109, 116 (2006) (in Texas the *Hopwood* decision was associated with a decrease in the number of Latino and African American applicants to colleges in the state); Susan K. Brown & Charles Hirschman, *The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College*, 79 Soc. Educ. 106, 108, 119 (2006). *See also* Kimberly A. Griffin et al., *The Influence of Campus Racial Climate on Diversity in Graduate Education*, 35 Rev. Higher Educ. 535, 557 (2012) (finding that "[b]road efforts to increase the presence of people of color across campus appear to influence favorably prospective students' perceptions of the institution's commitment to diversity and signal an appreciation of the voices, needs, and experiences of individuals from a variety of backgrounds").

race-conscious admissions are likely to experience similar discouragement effects.[13]

By contrast, policies that tell applicants they are desired for the diversity they bring can serve as a "symbolic beacon of a welcoming environment" encouraging students to apply or enroll at a selective institution.[14] A virtue of UT Austin's holistic policy is that it signals to African American and Latino students that their diverse backgrounds are valued and they will be welcome. This message is critically important given UT Austin's long struggle to overcome its history of *de jure* segregation and a brazenly hostile campus climate for African American and Latino students that persisted long after segregation was outlawed. *See* Brief for Respondent at 3-4 & n.1, *Fisher I*, 133 S. Ct. 2411 (summarizing the long history of *de jure* and *de facto* discrimination against African Americans and Latinos at Texas' public schools and at UT Austin).

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[13] Grant H. Blume & Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 Educ. Evaluation & Pol'y Analysis 1 (2014).

[14] Brown & Hirschman, *supra* note 12, at 108.

B. The Percent Plan Relies on Racially Isolated K-12 Schools and Is Insufficient to Meet UT Austin's Educational Goals

The percent plan is premised on the assumption that the large number of racially isolated schools in Texas will increase racial diversity at flagship campuses by guaranteeing admission to the top-performing students at those schools.[15] As the Fifth Circuit concluded, this feature of the ten percent plan is also a fundamental weakness (Pet. App. 32a). This feature of the plan is problematic in light of the documented harmful effects of segregation on test scores, which are most profoundly evident on African American student performance.[16] Furthermore, the level of racial isolation for African American students is different from that of Latino students in Texas and this difference makes the plan unequal in workability across racial groups.

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[15] Marta Tienda & Sunny Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312 (2006).

[16] Roslyn Arlin Mickelson et al., *Effects of School Racial Composition on K-12 Mathematics Outcomes: A Metaregression Analysis*, 83 Rev. Educ. Res. 121, 137-40 (2013) (showing the negative relationship between minority segregated schools and mathematics outcomes is especially harmful to African American students in high schools); Eric A. Hanushek et al., *New Evidence about* Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement*, 27 J. Lab. Econ. 349, 375-77 (2009).

A fundamental problem in the Petitioner's brief is the invalid assertion that African American and Latino students ought to be lumped together when analyzing important diversity data. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 723 (2007) (noting the importance of not aggregating racial groups with distinctive histories and experiences).

The percent plan has been particularly striking in its failure to create a significant presence of African American students in entering classes. Indeed, there are very few education regions in Texas where African American students are so isolated that a percent plan would mean they are automatically admitted to college. None of the education regions in Texas has a majority of African American students, and only one of the state's 73 school districts with more than 15,000 students (Beaumont) has a majority of African American students.[17] On average, African American students in Texas attend schools with half as many members of their own race as do Latino students. *See infra* App. Table 1. Thus, it is not surprising that African American students constituted an unacceptably low average of 3.7% of UT Austin's

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[17] Spring W. Lee et al., Tex. Educ. Agency, *Enrollment in Texas Public Schools 2010-11* 37-40, tbl. 18 (2011); Nat'l Ctr. Educ. Stats. (NCES), U.S. Dep't of Educ., *Selected Statistics on Enrollment, Teachers, Dropouts, and Graduates in Public School Districts Enrolling More Than 15,000 Students: 1994, 2000, 2006-07 & 2008*, Dig. Educ. Stat., tbl. 94 (Oct. 2010), http://nces.ed.gov/programs/digest/d10/tables/dt10_094.asp.

entering class during the period the percent plan alone was in place.[18] This represents fewer than 2 African American students in an average class of 50 students.

Studies further show that the limited growth in Latino enrollment at UT Austin largely reflects the rapidly increasing percentages of Latino students in the state, not changes in outreach effectiveness or policy changes related to the percent plan.[19] And even with considerable increases in Latino enrollment in K-12 schools in Texas, UT Austin "was unable to maintain the share of Black and Hispanic students that would have been admitted under a regime that allowed explicit consideration of race."[20]

C. A Race-Sensitive Admissions Process Is Necessary for the Individualized Consideration of Applicants Who Will Contribute to a Genuinely Diverse Learning Environment

The Fifth Circuit correctly concluded that unless supplemented by a holistic admissions policy that

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[18] *See* Tex. Higher Educ. Coordinating Bd., *First-Time Undergraduate Applicant, Acceptance, and Enrollment Information*, http://www.txhighereddata.org/Interactive/AppAccEnr.cfm (Texas Higher Education Data reports from 1998-2010).

[19] Angel L. Harris & Marta Tienda, *Hispanics in Higher Education and the Texas Top 10% Law*, 4 Race & Soc. Probs. 57, 59 (2012); Long & Tienda, *supra* note 10, at 266-67, 278 n.46.

[20] Long & Tienda, *supra* note 10, at 266-67, 278 n.46.

recognizes race, the percent plan prevents UT Austin from considering the experiences of students who fall outside their high school's top ten percent but excel in ways that allow them to make unique contributions to UT Austin's educational environment.

For instance, a substantial body of research has documented differential access to advanced placement and honors courses as well as patterns of within-school segregation that restrict opportunities for African American and Latino students.[21] Specifically for Petitioner's 2008 cohort, across Texas, 29% of white high school graduates took, and 17% successfully passed, one or more Advanced Placement exams, compared to 27% and 13% of Latino graduates and only 16% and 4% of African American graduates, respectively.[22] For these reasons, promising African

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[21] *See, e.g.*, Andrea Venezia & Michael W. Kirst, *Inequitable Opportunities: How Current Education Systems and Policies Undermine the Chances for Student Persistence and Success in College*, 19 Educ. Pol'y 283, 287, 289 (2005) (finding inequitable tracking in Texas along racial and class lines); David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. Pub. Econ. 2158, 2160 (2007); William H. Schmidt, *At the Precipice: The Story of Mathematics Education in the United States*, 87 Peabody J. Educ. 133, 140-41 (2012); Jeannie Oakes, *Keeping Track: Structuring Equality and Inequality in an Era of Accountability*, 110 Teachers C. Rec. 700, 705-07 (2008).

[22] College Board, *The 10th Annual AP Report to the Nation: Texas Supplement* fig. 5-9 (Feb. 2014), http://media.collegeboard.com/digitalServices/pdf/ap/rtn/10th-annual/10th-annual-ap-report-state-supplement-texas.pdf.

American and Latino applicants from largely white or integrated schools may not be in the top ten percent of their class. And yet, these students' previous experience in integrated schools gives them skills and understanding that could greatly help UT Austin obtain the benefits of diversity.

Thus, as a complement to the percent plan, the consideration of race during the holistic review process allows UT Austin to consider each applicant's personal, family, community, and academic histories and thus build a truly diverse learning environment that contributes to its mission.

III. The "Race-Neutral" Approaches Advanced by Petitioner and her Amici are Ineffective Alternatives to the Holistic Admissions Practices Endorsed in *Bakke*, *Grutter*, and *Fisher*

UT Austin's experience and analyses for other states demonstrate that policies like percent plans are ineffective substitutes for generating the rich diversity that contributes to UT Austin's educational mission. Complementing percent plans with family income alone, or in conjunction with wealth, also fails to achieve the educational benefits that holistic, race-sensitive admissions brings. When barred from considering race as a factor in admissions decisions, selective universities have dedicated substantial financial resources and tried myriad alternative strategies to achieve the racially and ethnically diverse student

bodies needed to prepare all students for success in an increasingly diverse and global marketplace. These efforts have resulted in less racially diverse campuses than those achieved under prior race-sensitive admissions policies. This evidence demonstrates that there are no effective substitutes for race-sensitive admissions in generating racial and ethnic diversity.

A. Percent Plans are Not by Themselves Effective Alternatives to Race-Sensitive Admissions Policies

The Court recognized in *Grutter* that percent plans are unsuitable for graduate and professional school admissions, which cannot rely on high school rankings. *See Grutter*, 539 U.S. at 340. Studies conducted since *Grutter* likewise confirm that – in undergraduate admissions – percent plans alone are not effective substitutes for a holistic policy that considers race.

Studies focusing on the country's most selective four-year campuses show that replacing a holistic admissions policy with a nationwide top ten percent plan would yield fewer students of color than a holistic policy that considers race.[23] These findings are

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[23] *See, e.g.*, Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010) (finding that even under unrealistic best case assumptions a percent plan rule alone would lead to a 10% decrease in the proportion of African American and Latino

(Continued on following page)

consistent even when modeling implausible "best case" assumptions such as high schools are completely homogenous with respect to race,[24] admission under the percent plan is extended to students from out of state and guaranteed at any institution of choice,[25] and where percent plan admissions are in place at private colleges and universities.[26]

Contrary to these "best case" assumptions, demographic federal data show that state differences in residential and educational segregation make it impossible to create one mechanistic admissions policy for achieving racial diversity that would work across all states or all groups. *See infra* App. Table 1.

Even in Texas, which hosts an automatic admissions plan with the least restrictive guidelines and the most transparent eligibility and enrollment rules in the nation, the percent plan has still not yielded the expected level of racial diversity given the state's

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students enrolled in highly selective colleges and universities); Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 361-64 (2009); Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 Rev. Econ. & Stat. 1020, 1031-32 (2004); Sean F. Reardon et al., Ctr. for Educ. Pol'y Analysis, *Race, Income, and Enrollment Patterns in Highly Selective Colleges, 1982-2004*, 12-15 (2012), http://cepa.stanford.edu/content/race-income-and-enrollment-patterns-highly-selective-colleges-1982-2004.

[24] Long, *supra* note 23, at 1032.

[25] Espenshade & Radford, *supra* note 23, at 362-64.

[26] Long, *supra* note 23, at 1031.

composition of segregated high schools and demographic increase of African American and Latino high school graduates.[27]

B. Socioeconomic Status Cannot Effectively Substitute for the Holistic Consideration of Race

UT Austin's holistic review process pursues both race and socioeconomic diversity. This is not unusual and is necessary for achieving the benefits of diversity. As a 2015 national survey by the American Council on Education reveals, colleges with race-sensitive admissions are substantially more likely to consider socioeconomic status than colleges that admit without attention to race.[28]

Further, numerous studies show that focusing on family income without also considering race would lead to the enrollment of substantially fewer students of color in selective schools than the holistic approach UT Austin takes.

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[27] Stella M. Flores & Catherine L. Horn, Educ. Testing Serv., *Texas Top Ten Percent Plan: How It Works, What Are Its Limits, and Recommendations to Consider* 10-12 (2015), http://www.ets.org/Media/Research/pdf/flores_white_paper.pdf.

[28] Lorelle L. Espinosa et al., Am. Council on Educ., *Race, Class, and College Access: Achieving Diversity in a Shifting Legal Landscape* 28-30 (2015), http://www.acenet.edu/news-room/Documents/Race-Class-and-College-Access-Achieving-Diversity-in-a-Shifting-Legal-Landscape.pdf.

To understand the implications of class-based admissions for racial diversity, researchers have relied on both campus experiences and on statistical simulations based on hypothetical data that span a range of possible situations. These analyses allow institutions and judges to evaluate the feasibility of many possible combinations of policies in generating racial student body diversity.

The consistent finding from a decade of studies is that race and socioeconomic status are simply not good substitutes for one another.[29] Many qualified African American and Latino college applicants are neither poor nor in the first generation of their family to go to college. Moreover, these groups represent only a small fraction of all low-income youth, and even a smaller fraction of high-achieving low-income youth.[30]

The most sophisticated analyses to date reinforce these conclusions. A 2015 study by Alon employs nuanced measures of class not previously considered

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[29] *See, e.g.*, Alan Krueger et al., *Race, Income, and College in 25 Years: Evaluating Justice O'Connor's Conjecture*, 8 Am. L. & Econ. Rev. 282, 309 (2006) ("The correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity."); Anthony P. Carnevale & Jeff Strohl, Geo. Pub. Pol'y Inst., Ctr. on Educ. & Workforce, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 37 (July 2013), https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf.

[30] See Carnevale & Strohl, *supra* note 29, at 37-38.

(like family wealth) and relies not only on hypothetical scenarios, but on an assessment of a large scale class-based race-neutral admissions policy. Alon's study finds that "the student bodies of elite colleges would be substantially less diverse racially and ethnically under all types of class-based affirmative action relative to current race-based policy."[31] This conclusion holds even if most socioeconomically disadvantaged students apply to selective colleges.

Another rigorous 2015 study by Reardon and colleagues, who employ rich simulation techniques, finds that programs that consider only socioeconomic status, without considering race, fail to produce substantial racial diversity, even when socioeconomic status is given substantial weight in admissions.[32]

In these robust analyses, and consistent with prior studies, in scenarios under which *both* class and race are considered, the level of racial and ethnic diversity can approach similar levels as those under race-sensitive admissions policies.[33] Under a policy that is both race- and class-sensitive, the increase in

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[31] Sigal Alon, *Race, Class, and Affirmative Action* 176 (2015).

[32] Sean F. Reardon et al., Educ. Testing Serv., *Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence from a Simulation Model* 21-22 (2015), http://www.ets.org/Media/Research/pdf/reardon_white_paper.pdf.

[33] Reardon et al., *supra* note 32, at 22; Alon, *supra* note 31, at 176-77.

racial diversity can also be achieved without sacrificing academic selectivity.[34]

The strong weight of the social science literature supports and reinforces the conclusion that socioeconomic status is not an effective substitute for the consideration of race as one factor in admissions.

C. Substituting Socioeconomic Status for Race Sensitivity in Admissions Would Be Intolerably Expensive

Under *Fisher I*, a key question is whether "a nonracial approach . . . could promote the substantial interest about as well *and at tolerable administrative expense*." (Pet. App. 112a) (emphases added and citations omitted). Accordingly, considerations about the sufficiency of class-based alternatives cannot be divorced from the fact that most colleges and universities could not meet the financial needs that substituting socioeconomic disadvantage for race consciousness would entail. For instance, state support only accounts for 14% of UT Austin's budget today, with tuition now surpassing it as a source of revenue.[35]

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[34] Alon, *supra* note 31, at 177.

[35] William Powers, Univ. of Tex. at Austin, President, Address at the University of Texas at Austin: The Public Research University of the Future (May 9, 2011), http://www.utexas.edu/president/pdf/FactSheet05092011.pdf.

Despite these very real financial constraints, amici who advocate substituting socioeconomic disadvantage as an alternative to race-sensitive admissions ignore the fact that UT Austin already gives special attention to low-income status. This attention is reflected in UT Austin's high level of Pell Grant students, the best comparative measure of need-based enrollment. The year that Petitioner sought enrollment (2008-09) UT Austin ranked 8th out of 108 U.S. "very high" research doctoral universities in the Pell Grant aid received by its undergraduates ($27.5 Million).[36] And UT Austin spends more of its budget on gift/scholarship aid than its students receive in state and federal aid.[37] UT Austin is therefore already investing heavily in its allocation of resources to support students from low-income families.

To significantly "move the needle" on enrolling low-income students would require UT Austin to invest on such a massive scale, far exceeding the amounts implied by this Court's "tolerable administrative

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[36] Nat'l Ctr. Educ. Stats., Integrated Postsecondary Education Data System (IPEDS), http://nces.ed.gov/ipeds/datacenter/Ranking.aspx (from this data query tool, go to "compare institutions," and under groupings select Carnegie classification 2010 and then doctoral universities/very high research; then under "variables," go to financial aid and select "total amount of Pell Grant aid" for 2008-09).

[37] Univ. of Cal., Accountability Report 2.3.1 (2015), http://accountability.universityofcalifornia.edu/2015/chapters/chapter-2.html#2.3.1 (average per capita given aid for all Association of American Universities for 2012-13, using IPEDS data).

expense" jurisprudence. The findings of one recent study show that institutional gift aid at University of California (UC) campuses represents an upper bound for cross-subsidizing low-income enrollments. Although the most selective UC campuses disperse over twice the per student gift aid as UT Austin, their undergraduate racial diversity does not match that at UT Austin.[38]

D. Other Alternatives Cited by Amici in Support of the Petitioner Are Not Effective Substitutes for the Holistic Consideration of Race

One amicus curiae references an array of alternatives for UT Austin to consider (*see* Brief of Richard D. Kahlenberg at 12-16). These options are not effective alternatives to race-sensitive admissions. A 2015 study by American Council on Education, which amicus cites for support, shows that the institutions using race-conscious admissions are much more likely than other institutions to be also already using a variety of other approaches.[39] If by themselves these alternative approaches were sufficient, there would be no need for attention to race, but the great majority of

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[38] William Kidder & Patricia Gándara, Educ. Testing Serv., *Two Decades after the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts* 27 (2015), http://www.ets.org/Media/Research/pdf/kidder_paper.pdf.

[39] Espinosa et al., *supra* note 28, at 27, 30.

selective campuses in states that allow race-conscious policies also consider them necessary.[40]

Moreover, after Proposition 209 banned the consideration of race in admissions in California, the University of California (UC) invested heavily in K-12 academic preparation programs, only to find this financially unsustainable for either UC or the state of California due to the mammoth scale of racial/ethnic disparities in school learning opportunities.[41] Even after the implementation of percent plans, holistic systems that considered class but not race, extensive outreach, a huge increase in the financial support offered low-income students, special efforts to welcome students of color to campus, and increasing demographic shifts for Latino students, applications, admissions, and enrollments for African American and Latino freshmen were still below pre-Proposition 209 levels at UC Berkeley and UCLA 15-20 years after the ban on considering race was imposed.[42]

These outcomes are, sadly, not surprising as they are consistent with statistical analyses that simulate the impact of replacing holistic admissions policies that consider race with race-neutral efforts.[43]

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[40] *Id.*

[41] Kidder & Gándara, *supra* note 38, at 3-13.

[42] *Id.* at 3-13, 13-23.

[43] Howell, *supra* note 23, at 148-56.

In short, considering race as one among many factors in admissions is necessary to maintain minimally adequate racial diversity within many selective undergraduate institutions in a society where almost half of public high school graduates are non-white.

IV. Eliminating Individualized Considerations of Race in the Narrowly Tailored Manner Endorsed by the Court as Employed by UT Austin Would Harm the Quality of Education for All Students, Race Relations, and the Nation's Future

Despite sustained race-neutral efforts to increase racial diversity at colleges and universities in states where race-sensitive admissions decisions are banned, racial diversity has dropped at selective undergraduate institutions and at graduate and professional programs, particularly in the sciences, business, medicine, and law. These declines not only degrade the educational experience afforded all students but also threaten the preparation and prospects of a multiracial group of potential future leaders. Singling out race as the one aspect of a person's core identity that college admissions officers cannot consider directly undermines campus racial climates and other institutional efforts that attempt to address the ways in which race shapes students' educational experiences. These institutional experiences highlight the harm UT Austin is seeking to avoid.

A. Public Institutions that Cannot Implement Race-Sensitive Admissions Have Experienced Substantial Declines in Racial Diversity, Harming the Nation's Future

The substantial decline in racial student body diversity that they have experienced has made it especially difficult for institutions to live up to the declaration in *Grutter* that, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332. Where bans are in place, educational quality has been compromised for all students not only in the classroom but also by limiting opportunities to acquire, through interaction with racially diverse peers, the skills needed to flourish socially and economically in an increasingly diverse local and global workforce.

1. Racial Diversity Has Fallen Significantly at Selective Undergraduate Institutions that Are Barred from Considering Race as a Factor in Admissions

A number of studies document the decline in racial diversity at selective colleges across the nation that can no longer consider race as a factor in

admissions.[44] After Proposition 209 prohibited race-conscious admissions decisions in California, racial diversity declined significantly at the University of California (UC) flagship campuses. Between 1997 and 1998, enrollments of African American freshman at UC Berkeley declined by 53%, while Latino enrollees fell by 45%.[45] In the same period, African American enrollments at UCLA dropped by 38%, while Latino enrollments declined by 30%.[46] Although demographic shifts have resulted in a modest recovery in absolute numbers, especially for Latinos, since that time,

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[44] Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 Rev. Econ. & Stat. 712, 717 (2012) (finding that bans on race-conscious admissions policies in multiple states have led to a 1.74 percentage-point decline in African American enrollment and a 2.03 percentage-point decline in Latino enrollment at the most selective institutions); Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. Hum. Resources 435, 440-47 (2012) (finding similar declines in multiple states).

[45] African American enrollment dropped from 7% (or 252 in a class of 3,215 students) to 3.7% (122 African American students in a class of 3,333 students). Latino and Chicano student enrollment dropped from 14.6% (or 469 in a class of 3,215 students) to 7.9% (266 in a student body of 3,333 students). Univ. of Cal. Office of the President, *University of California Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 Through 2010*, 1-2, 5 (2015), http://www.ucop.edu/institutional-research-academic-planning/_files/factsheets/2014/flow-frosh-ca-14.pdf.

[46] A decline of enrolled African American students from 5.6% to 3.5% and of enrolled Latino and Chicano students from 15.8% to 11%. *Id.* at 5.

neither campus has regained the diversity it had in 1995. Also, prohibitions on the holistic consideration of race in admissions have shifted Latino and African American students from more selective to less selective colleges, which limits these students' educational and later career opportunities.[47]

As is true of selective colleges in other states, the University of Michigan, Ann Arbor, despite its best efforts to maintain racial diversity, experienced a sharp decline in the enrollment of students of color after Proposal 2 took effect. From 2006 to 2012, the proportion of African American undergraduate students enrolled declined by about 25% and the proportion of Latino students fell by 24%.[48]

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[47] Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action, in Equal Opportunity in Higher Education: The Past and Future of California's Proposition 209*, 33, 33 (Eric Grodsky & Michal Kurlaender eds., 2010).

[48] Total African American enrollment dropped from 6.11% to 4.6% and Latino student enrollment declined from 5.1% to 3.85%. Univ. of Mich. Office of the Registrar, *Enrollment Reports for 2012 and 2010*, http://deepblue.lib.umich.edu/handle/2027.42/96814, and http://deepblue.lib.umich.edu/handle/2027.42/96812.

2. Racial Diversity Has Dropped Significantly in Areas Like Medicine, Business, and Law that Train Future Leaders and Serve the Nation's Health and Justice Needs and Advance Sciences Critical to Industry and Defense

In addition to declines in racial diversity at selective colleges and universities, which provide important pathways to graduate education, racial student body diversity has dropped substantially in professional schools in medicine, business, and law, and in graduate science fields that are critical for continued scientific and technological advancement and to national security.

With widely documented health disparities, the U.S. is facing a real crisis when it comes to the health of its racial and ethnic minorities. A substantial body of research has found that greater racial and ethnic diversity in health professions improves public health by increasing access to care for underserved populations, and by increasing opportunities for minority patients to see practitioners with whom they share a common race, ethnicity, or language.[49] Close examinations of medical school graduates further indicate

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[49] *See, e.g.*, U.S. Dep't of Health & Human Services, Bureau of Health Prof'ls, *The Rationale for Diversity in the Health Professions: A Review of the Evidence* 3 (2006), http://bhpr.hrsa.gov/healthworkforce/reports/diversityreviewevidence.pdf.

that professionals of color disproportionately serve members of their own ethnicity or race.[50]

Yet, bans on race-sensitive admissions at public institutions across six states have led to a 17% drop in the percentage of enrolled students in medical schools who are Latino, African American, or Native American.[51] Similar declines were seen in Texas public medical schools after *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003), prohibited institutions from considering race as a factor in admissions.[52] When race cannot play a role in professional school admissions, minority communities are likely to suffer not just from the quality of the care they receive, but from its very availability.

Racial diversity has also declined in business schools and law schools. At the six public business schools in the UC system in 2014, African Americans, Latinos, and American Indians *combined* were only 5.3% of UC's M.B.A. students, less than half of the

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[50] *See, e.g.*, Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care 114-15, 122-23 (Brian D. Smedley et al. eds., 2003), http://www.nap.edu/catalog/10260/unequal-treatment-confronting-racial-and-ethnic-disparities-in-health-care.

[51] This drop represents a decline from 18.5% to 15.3%. Liliana M. Garces & David Mickey-Pabello, *Racial Diversity in the Medical Profession: The Impact of Affirmative Action Bans on Underrepresented Students of Color Matriculation in Medical Schools*, 86 J. Higher Educ. 264, 287 (2015).

[52] MALDEF, *supra* note 11, at 36.

average at comparable U.S. business schools.[53] Minority degree attainment also spirals downward after race as a factor in admissions decisions is banned. Across all UC first-time professional degrees awarded (law, medicine, pharmacy, business, public policy, architecture, etc.), African Americans and Latinos comprised nearly 20% of the degrees granted in the pre-Proposition 209 graduating class of 1997, compared to only 10% of UC's professional school graduates in 2010.[54]

The nation has an urgent need to produce one million more science, technology, engineering, and mathematics graduates to meet workforce need projections and keep America internationally competitive.[55] Meeting this need is undercut by the drops in student body diversity in technologically-critical and security-sensitive science fields. Bans on race-sensitive admissions across four states have led to a 26% drop[56] in the percentage of engineering graduate

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[53] Kidder & Gándara, *supra* note 38, at 30.

[54] *Id.* at 31.

[55] President's Council of Advisors on Sci. & Tech., *Engage to Excel: Producing One Million More College Graduates with Degrees in Science, Technology, Engineering, and Mathematics* 1 (2012), https://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-engage-to-excel-final_2-25-12.pdf; Comm. on Sci., Eng'g & Pub. Policy, *Expanding Underrepresented Minority Participation: America's Science and Technology Talent at the Crossroads* 34 (2011), http://www.nap.edu/read/12984/chapter/5#34.

[56] A decline from 6.2% to 4.6%. Liliana M. Garces, *Understanding the Impact of Affirmative Action Bans in Different*

(Continued on following page)

students who are Latino, African American, or Native American, and a 19% decline[57] in the natural sciences.[58] These declines lead to a lack of the diverse perspectives needed in these fields to foster the innovation necessary to tackle complex research problems and advance scientific inquiry.[59] With a 48.5% non-white K-12 student population, these declines show why postsecondary institutions need to be able to consider race in their admissions policies if the U.S. is to remain a world leader in industry, defense, and basic science.

B. Low Levels of Racial Diversity and the Inability to Consider Race Are Associated with a Less Welcoming Campus Racial Climate

There is little dispute about the desirability of "getting beyond race" in America. As Justice Kennedy stated, the "enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring). Social science bears directly on these questions, and shows that there are meaningful positive relationships

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Graduate Fields of Study, 50 Am. Educ. Res. J. 251, 274-75 (2013).

[57] A drop from 7.8% to 6.3%. *Id.*

[58] *Id.*

[59] *See, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 327 (2007).

between the limited consideration of race in undergraduate admissions (like at UT Austin) and fostering a more hospitable racial climate where African American and Latino students are less isolated and less subject to stigmatic harm, stereotyping, and discrimination.

UT Austin implemented its holistic policy after determining that its African American and Latino students felt isolated on campus in part because of limited racial diversity (Joint App. at 446a). Follow-up administrations of the Student Experience in the Research University (SERU) survey in 2010, 2011, and 2013 (combined) support the proposition that race continues to matter at UT Austin and other college campuses.[60]

On average, only 65.4% of African Americans and 87.7% of Latinos either "somewhat agree," "agree," or "strongly agree" that "students of my race/ethnicity are respected on this campus," compared to 96.9% of whites. *See infra* App. Fig. A.

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[60] For additional information about the SERU survey, *see* William C. Kidder, Civ. Rts. Project, *The Salience of Racial Isolation: African Americans' and Latinos' Perceptions of Climate and Enrollment Choices with and without Proposition 209* 34-37 (2012), http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-salience-of-racial-isolation-african-americans2019-and-latinos2019-perceptions-of-climate-and-enrollment-choices-with-and-without-proposition-209/Kidder_Racial-Isolation_CRP_final_Oct2012-w-table.pdf.

At the University of California, Berkeley (UC Berkeley) and Los Angeles (UCLA), which like UT Austin are leading public research universities, but which unlike UT Austin are barred from considering race in admissions, the campus racial climate, as evidenced by responses to the same SERU survey, is *far worse*. Combining survey results from 2008-14, only 52.1% of African American respondents at Berkeley and 57.2% at UCLA at least "somewhat agree" that students of their race are respected on campus (again, compared to 65.4% at UT Austin). *See id.* Results for Latinos at UC Berkeley (73.4%) and UCLA (71.2%) are likewise significantly worse than at UT Austin (87.7%). *Id.*

These climate surveys from UT Austin and other leading research universities are consistent with the Diverse Learning Environments (DLE) survey administered in recent years to a broader range of U.S. colleges and universities. The initial results from 31 institutions across the country, including several campuses in Texas and California, show that lower levels of campus diversity are associated with greater reporting by African American and Latino students of stereotyping and discrimination.[61]

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[61] *See* Sylvia Hurtado & Adriana Ruiz, UCLA Higher Educ. Res. Inst., *The Climate for Underrepresented Groups and Diversity on Campus* 2 (2012), http://heri.ucla.edu/briefs/urmbrief report.pdf (initial DLE study including 490 African American students and 3,488 Latino students).

African American and Latino students are more likely to feel excluded from campus events and activities at institutions with low levels of racial diversity than at those with higher levels. Although African American students are not the predominant minority on any of these campuses, the data indicate that they feel more included where there is a diverse campus environment. Higher levels of diversity on campus are also significant in reducing Latino students' feelings of isolation.[62]

A survey of 58 schools shows that in the sample's least diverse schools about one in five (20.5%) African American students and one in seven (14.5%) Latino students reported at least one discriminatory incident to campus authorities (*see infra* App. Fig. B), and this is just the tip of the iceberg since most instances of perceived bias and discrimination go unreported.[63] In the survey's more diverse schools, significantly lower percentages of African American and Latino students report such incidents.

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[62] Intergroup relations at highly diverse institutions, such as those where underrepresented minority students are 36% or more, also require attention, as increasing numbers of Latino students transform campuses with previously predominantly white environments. *Id.*

[63] Sylvia Hurtado & Adriana Ruiz Alvarado, UCLA Higher Educ. Res. Inst., *Discrimination and Bias, Underrepresentation, and Sense of Belonging on Campus* 2 (2015), http://www.heri.ucla.edu/PDFs/Discriminination-and-Bias-Underrepresentation-and-Sense-of-Belonging-on-Campus.pdf.

Other data from over 8,000 Latino students on 82 campuses show that reports of feelings of exclusion, negative verbal comments, and offensive visual images are lower in moderately diverse institutions (with 21-35% African American and Latino student enrollment) than in less diverse institutions and diminish still further as minority enrollments increase (*see infra* App. Fig. C).[64]

Other Diverse Learning Environments survey research on college students confirms that African Americans, American Indians, and Latinos manifest much greater "racial salience" (i.e., they think about their racial group membership and identity with greater frequency) than white students,[65] which is related to the racial dynamics described above. These data underscore the need for UT Austin to supplement the percent plan with the flexible consideration of race if it is to create a positive racial climate on campus to leverage the educational benefits of diversity for all students.

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[64] *See also* Rebecca L. Stotzer & Emily Hossellman, *Hate Crimes on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. Interpersonal Violence 644, 654-55 (2012) (finding that more diverse campuses have per capita fewer reports of hate crimes).

[65] Sylvia Hurtado et al., *Thinking about Race: The Salience of Racial Identity at Two- and Four-year Colleges and the Climate for Diversity*, 86 J. Higher Educ. 127, 140 (2015).

C. The Inability to Consider Race as One Among Many Factors in Admissions Can Harm Race Relations and Prevent Institutions from Addressing Racial Barriers for Students

Because race often operates subconsciously to shape attitudes and behavior, not allowing attention to race in admissions can harm race relations despite the hopeful but unsupported suggestion that it would have the opposite effect. An extensive overview by Tropp and colleagues of how social science informs the use and interpretation of racial categorization demonstrates that classifications on the basis of race may be necessary to improve race relations and to address the ways in which race influences the educational experiences of students.[66] This is because race operates not only structurally to shape a child's life chances, including his or her opportunity for a quality education, but also at the individual level, influencing the thoughts and behavior of individuals of all races.

Race matters in subconscious ways through implicit biases, such as attitudes toward particular social groups[67] and other racialized psychological

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[66] Linda R. Tropp et al., *The Use of Research in the Seattle and Jefferson County Desegregation Cases: Connecting Social Science and the Law*, 7 Analyses Soc. Issues & Pub. Pol'y 93, 114 (2007).

[67] *See* John F. Dovidio et al., *The Nature of Contemporary Racial Prejudice: Insight from Implicit and Explicit Measures of Attitudes, in Attitudes: Insights from the New Implicit Measures* 165-86 (Richard E. Petty, Russell H. Fazio & Pablo Briñol eds.,

(Continued on following page)

phenomena such as stereotype threat (classically manifested in high stakes test performance, involving the threatening experience of conforming to negative race-based stereotypes present in the larger society).[68] Failing to consider race in the limited manner permitted by Court precedent can harm both majority and minority groups by allowing harmful racial stereotypes to operate without policies that can help counter such negative perceptions.

Studies have shown that suppressing the ability to consciously consider race can cause educators to reproduce the very racial inequities they wish to dismantle.[69] Other studies have shown that laws barring the consideration of race in admissions decisions have hindered institutional efforts to support students by making racial diversity efforts on campus less visible and making higher education professionals

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2008); John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. Personality & Soc. Psychol. 62, 62 (2002).

[68] *See* Claude M. Steele, *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us*, 134-90 (2010); Toni Schmader & Michael Johns, *Converging Evidence That Stereotype Threat Reduces Working Memory Capacity*, 85 J. Personality & Soc. Psychol. 440, 449-50 (2003).

[69] Mica Pollock, *Colormute* 4-5 (2004). *See also* Evan P. Apfelbaum et al., *Racial Color Blindness: Emergence, Practice, and Implications*, 21 Current Directions in Psychol. Sci. 205, 206 (2012); Evan P. Apfelbaum et al., *In Blind Pursuit of Racial Equality?*, 21 Psychol. Sci. 1587, 1591 (2010).

who have sought to promote racial diversity feel less empowered.[70]

Because efforts to achieve the educational benefits of diversity require visible, sustained support at various institutional levels,[71] barring race-sensitivity at the outset thus creates serious barriers for institutions seeking to further diversity in service of their educational mission. These bars undermine the support students of color need to succeed and, paradoxically, to feel that, as individuals, they are not defined solely by their race.[72] By contrast, acknowledging and affirming group membership can positively motivate students of color.[73]

Given that race is very often at play implicitly, whether we intend it or not, forbidding explicit attention to race may only impair interracial relations, while allowing for its consideration in the narrowly

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[70] Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-Level Administrators Understand a Prohibition on Race-Conscious Postsecondary Admissions Policies*, 52 Am. Educ. Res. J. 828, 849-55 (2015).

[71] *See, e.g.*, Jeffrey F. Milem et al., *Making Diversity Work on Campus: A Research-Based Perspective* iv (2005), https://www.aacu.org/sites/default/files/files/mei/milem_et_al.pdf.

[72] *See* Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 J. Const. Law 781, 782-83 (2015).

[73] *See* Linda R. Tropp & Rebecca A. Bianchi, *Interpreting References to Group Membership in Context: Feelings About Intergroup Contact Depending on Who Says What to Whom*, 37 Eur. J. Soc. Psychol. 153, 165 (2007).

tailored manner that UT Austin considers it can improve mutual understanding and social cohesion.

CONCLUSION

For the foregoing reasons, this Court should affirm the Fifth Circuit's judgment that UT Austin's holistic admissions policy satisfies the Court's strict scrutiny requirements.

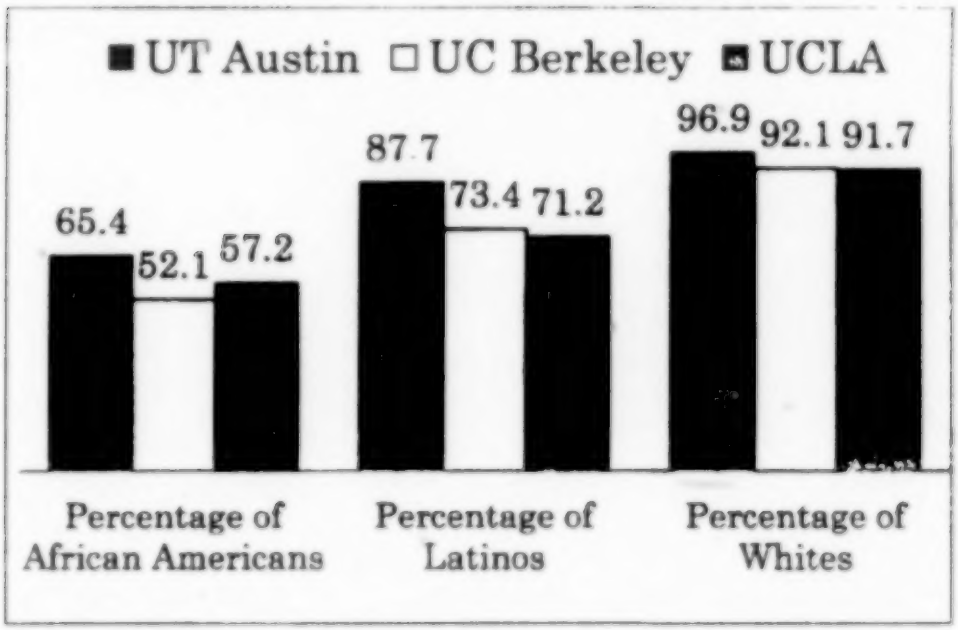
Respectfully submitted,

LILIANA M. GARCES
Counsel of Record
PENN STATE COLLEGE OF EDUCATION
400 Rackley Building
University Park, PA 16802
(814) 865-9754
lmg340@psu.edu

October 30, 2015

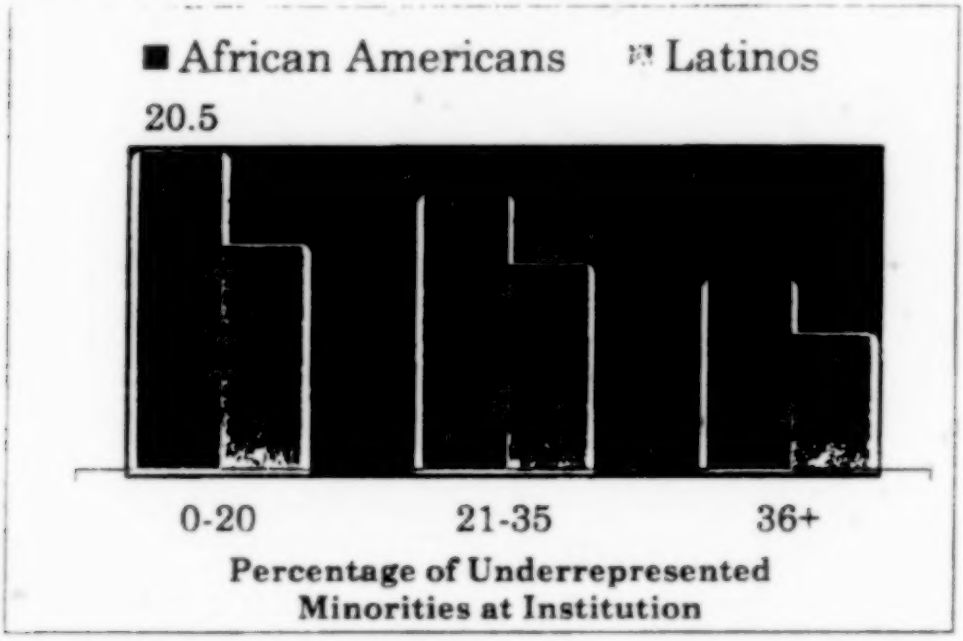
APPENDIX

Figure A. **Percentage of African American, Latino and White Undergraduates Who Responded "Strongly Agree," "Agree" or "Somewhat Agree" to the Question: "Students of My Race/Ethnicity Are Respected on this Campus" – Survey Results from 2008-2014.**[1]



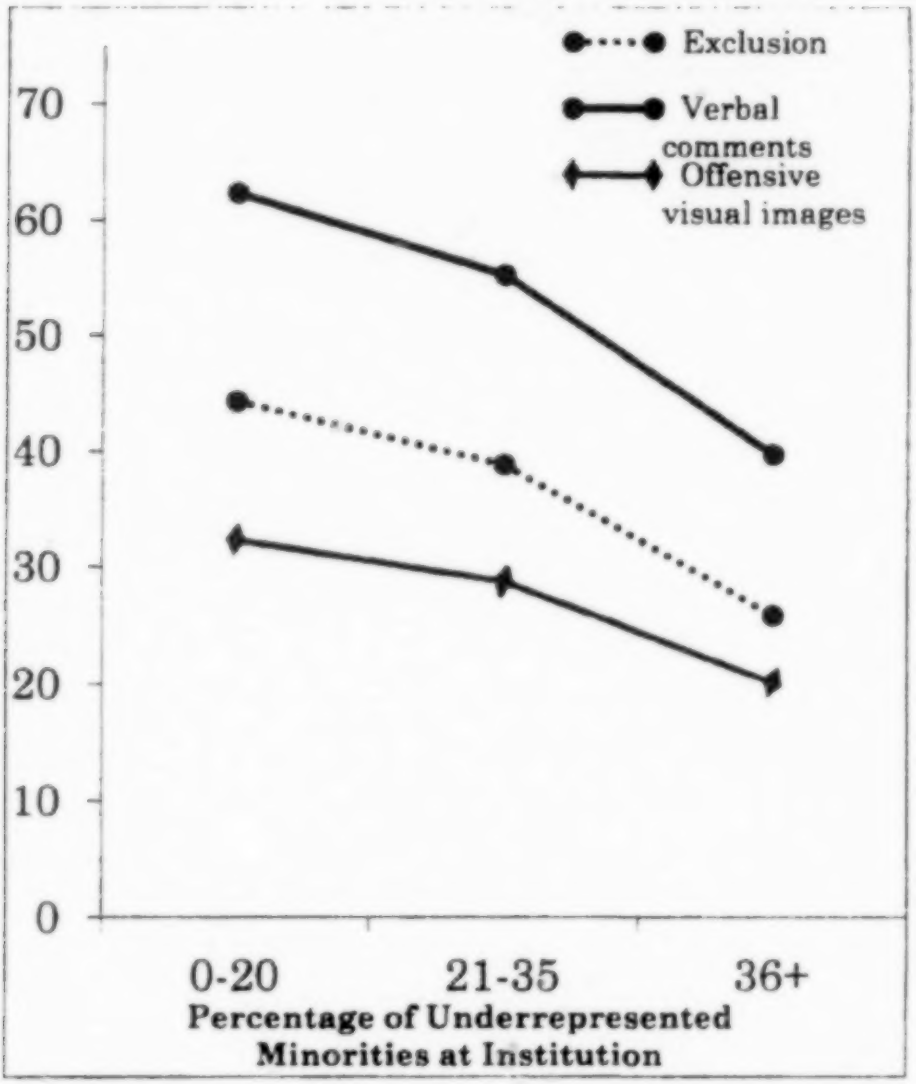
[1] Responses at UT Austin in 2010, 2011 and 2013, and at UC Berkeley and UCLA in 2008, 2010, 2012 and 2014 combined. At UT Austin, the survey is called the Student Experience in the Research University (SERU) and within UC Berkeley and UCLA, the survey is called UC Undergraduate Experience Survey (UCUES). For UT Austin, UC Berkeley, and UCLA respectively, the survey samples are as follows: African Americans = 552, 643 and 484; Latinos = 2,820, 2,982, and 2,686; and whites = 7,026, 6,571, and 4,967. Analyses show statistically significant differences for each group.

Figure B. **Percentage of African American and Latino Students Responding "Yes" to Reporting an Incident of Discrimination or Bias.**



Source: Diverse Learning Environments Survey, 2010-2015, Higher Education Research Institute, UCLA. Based on 8,887 students and 58 campuses, including those in Texas.

Figure C. **Average Percentage of Latino Students Experiencing Forms of Discrimination or Bias, Reported at Institutions with Different Percentages of Underrepresented Minorities.**



Source: Diverse Learning Environments Survey, 2010-2015, Higher Education Research Institute, UCLA. Based on 8,044 students and 82 campuses, including those in Texas.

Table 1. **Average Percentage of Schoolmates from the Same Racial Group for African American and Latino Students in Public K-12 Schools in 2009-2010 for States.**

State	Average Percentage of African American Schoolmates for African American Students	Average Percentage of Latino Schoolmates for Latino Students
Alabama	65.7	*
Alaska	*	10.5
Arizona	10.6	61.4
Arkansas	57.8	27.5
California	19.4	67.1
Colorado	18.9	48.5
Connecticut	35.7	38.4
Delaware	43.6	24.2
Florida	46.5	49.3
Georgia	61.0	29.4
Hawaii	*	6.9*
Idaho	*	27.4
Illinois	64.7	57.2
Indiana	50.1	22.6
Iowa	18.6	22.7
Kansas	26.5	37.8

Kentucky	32.0	*
Louisiana	66.3	*
Maine	*	*
Maryland	63.5	28.6
Massachusetts	29.5	41.9
Michigan	67.1	23.8
Minnesota	31.0	19.4
Mississippi	71.7	*
Missouri	58.9	*
Montana	*	*
Nebraska	33.4	38.8
Nevada	19.5	50.8
New Hampshire	*	*
New Jersey	47.2	47.9
New Mexico	*	70.9
New York	50.4	48.1
North Carolina	47.3	20.6
North Dakota	*	*
Ohio	62.4	*
Oklahoma	33.4	30.4
Oregon	*	34.9
Pennsylvania	56.0	37.3
Rhode Island	19.9	48.9
South Carolina	54.6	13.6

South Dakota	*	*
Tennessee	62.6	16.1
Texas	33.8	67.8
Utah	*	30.1
Vermont	*	*
Virginia	48.8	24.3
Washington	16.5	40.0
West Virginia	18.5	*
Wisconsin	51.3	29.4
Wyoming	*	19.4

Note: * African American or Latino students constitute less than 4.45% of total secondary school enrollment.

Source: National Center for Education Statistics, 2009-2010.

List of Amici Curiae

Elisa S. Abes, Miami University

Maurianne Adams, University of Massachusetts Amherst

Tara Lynn Affolter, Middlebury College

Amefil Agbayani, University of Hawaii at Manoa

Alexandrina Agloro, Worcester Polytechnic Institute

Onwubiko Agozino, Virginia Polytechnic Institute and State University

Iliana Alanis, University of Texas at San Antonio

Ben Matthew Alcott, University of Cambridge

Ursula S. Aldana, University of San Francisco

Yvette Marie Alex-Assensoh, University of Oregon

Nathan Napoleon Alexander, University of San Francisco

Arshad I. Ali, George Washington University

Tennille Allen, Lewis University

Marcus David Allen, Guttman Community College, City University of New York

Walter Recharde Allen, University of California, Los Angeles

Sigal Alon, Tel Aviv University

Cecil E. Canton, California State University, Sacramento

Armando Cantu Alonzo, Texas A&M University

Susan D. Amussen, University of California, Merced

Margaret L. Andersen, University of Delaware

Noel Scott Anderson, New York University

Kathryn M. Anderson-Levitt, University of Michigan

anthony lising antonio, Stanford University

Jacob Apkarian, Virginia Polytechnic Institute and State University

Barbara Applebaum, Syracuse University

Adele Arellano, California State University, Sacramento

Lucy Arellano, Oregon State University

Nancy Ares, University of Rochester

M. Beatriz Arias, Arizona State University

Jan Louise Arminio, George Mason University

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Alfredo J. Artiles, Arizona State University

Wayne Au, University of Washington Bothell

Maren Aukerman, Stanford University

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Bruce D. Baker, Rutgers University

Arnetha F. Ball, Stanford University

Kira Hudson Banks, Saint Louis University

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Heidi Lasley Barajas, University of Minnesota

Sarah Nelson Baray, Texas State University

Edwin J. Barea Rodriguez, University of Texas at San Antonio

Cassie L. Barnhardt, University of Iowa

Michael Bastedo, University of Michigan

Lee Anne Bell, Barnard College

Alfredo H. Benavides, Texas Tech University

Alain Bengochea, Ohio State University

Estela Mara Bensimon, University of Southern California

Joseph B. Berger, University of Massachusetts Amherst

Matt Bergman, University of Louisville

David C. Berliner, Arizona State University

Ellen Berrey, University of Denver

Manuel P. Berriozábal, University of Texas at San Antonio

Daina Ramey Berry, University of Texas at Austin

Tamara Bertrand Jones, Florida State University

Stuart Biegel, University of California, Los Angeles

Robert Bifulco, Syracuse University

Mollie V. Blackburn, Ohio State University

Gilda Maria Bloom-Leiva, San Francisco State University

David Bloome, Ohio State University

A. Lynn Bolles, University of Maryland

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Eileen Boris, University of California, Santa Barbara

Nicholas A. Bowman, University of Iowa

Phillip Jess Bowman, University of Michigan

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Patricia Bromley, Stanford University

Jeffrey S. Brooks, Monash University

Daphne Ann Brooks, Yale University

Rebecca Brower, Florida State University

Charles C. Brown, University of Michigan

M. Christopher Brown II, Southern University System

David L. Brunsma, Virginia Polytechnic Institute and State University

Tracy L. Buenavista, California State University, Northridge

Beth E. Bukoski, University of Texas at Austin

Bryce D. Bunting, Brigham Young University

Susan Burch, Middlebury College

Rebeca Burciaga, San José State University

Ann Burnett, North Dakota State University

Melanie E. L. Bush, Adelphi University

Patricia L. Busk, University of San Francisco

Nola Madelyn Butler-Byrd, San Diego State University

Angela Byars-Winston, University of Wisconsin-Madison

William Carson Byrd, University of Louisville

Alberto F. Cabrera, University of Maryland

Nolan L. Cabrera, University of Arizona

Toni Calasanti, Virginia Polytechnic Institute and State University

Rebecca M. Callahan, University of Texas at Austin

Patrick Camangian, University of San Francisco

Albert M. Camarillo, Stanford University

Gregory Camilli, Rutgers University

Colette Cann, Vassar College

Nancy Cantor, Rutgers University

Brendan Cantwell, Michigan State University

Sarah Capitelli, University of San Francisco

Doris Wright Carroll, Kansas State University

Deborah Faye Carter, Claremont Graduate University

Prudence L. Carter, Stanford University

Dorinda J. Carter Andrews, Michigan State University

Ursula Casanova, Arizona State University

Milagros Castillo-Montoya, University of Connecticut

Erin L. Castro, University of Utah

Keith C. Catone, Brown University

Wendy Cavendish, University of Miami

Jaime Chahin, Texas State University

Crystal Renee Chambers, East Carolina University

Mitchell James Chang, University of California, Los Angeles

Jorge Chapa, University of Illinois at Urbana-Champaign[2]

Tabbye Maria Chavous, University of Michigan

Barry Checkoway, University of Michigan

Anthony S. Chen, Northwestern University

John J. Cheslock, Pennsylvania State University

Vichet Chhuon, University of Minnesota

Doris M. Ching, University of Hawai'i-West O'ahu

José Cintrón, California State University, Sacramento

Christine Clark, University of Nevada, Las Vegas

---

[2] Professor Jorge Chapa, a confirmed signatory, passed away before the filing of this brief.

Ellen R. Clark, University of Texas, San Antonio

Casey D. Cobb, University of Connecticut

Elizabeth F. Cohen, Syracuse University

Kevin O. Cokley, University of Texas at Austin

Darnell Cole, University of Southern California

Samuel R. Cook, Virginia Polytechnic Institute and State University

Kristy Cooper, Michigan State University

Sean P. Corcoran, New York University

Heidi M. Coronado, California Lutheran University

Shelley J. Correll, Stanford University

Charles L. Cotrell, St. Mary's University

Matthew J. Countryman, University of Michigan

Eugenia D. Cowan, California State University, Sacramento

Gloria Crisp, University of Texas at San Antonio

Dean S. Cristol, Ohio State University

Natasha N. Croom, Iowa State University

Cindy Cruz, University of California, Santa Cruz

Jose B. Cuellar, San Francisco State University

Mary Jane Curry, University of Rochester

Bradley R. Curs, University of Missouri

Mary Ann Danowitz, North Carolina State University

Luciana N. Dar, University of California, Riverside

Antonia Darder, Loyola Marymount University

Marsha J. Tyson Darling, Adelphi University

Michele Landis Dauber, Stanford University

Jonathan Ryan Davis, College of New Jersey

Kyle De Young, University of North Dakota

Linda DeAngelo, University of Pittsburgh

Elizabeth H. DeBray, University of Georgia

Janet R. Decker, Indiana University Bloomington

Jay R. Dee, University of Massachusetts Boston

John D. DeLamater, University of Wisconsin-Madison

Rocio Delgado, Trinity University

Dolores Delgado Bernal, University of Utah

Matthew Delmont, Arizona State University

Sonia DeLuca Fernández, New York University

Robin Maria DeLugan, University of California, Merced

Eric J. DeMeulenaere, Clark University

Karen DeMoss, Wagner College

Melinda L. Denton, University of Texas at San Antonio

Meera E. Deo, Thomas Jefferson School of Law

Joel A. Devine, Tulane University

John B. Diamond, University of Wisconsin-Madison

Rosalina Diaz, Medgar Evers College, City University of New York

Sarah Diem, University of Missouri

Danielle Dirks, Occidental College

Anna M. DiStefano, Fielding Graduate University

Adrienne Denise Dixson, University of Illinois at Urbana-Champaign

Ashley Wood Doane, University of Hartford

Corey William Dolgon, Stone Hill College

Joe F. Donaldson, University of Missouri

Brian Wayne Dotts, University of Georgia

Kevin J. Dougherty, Columbia University

Alicia C. Dowd, University of Southern California

Noah D. Drezner, Columbia University

Michael J. Dumas, University of California, Berkeley

Ebony M. Duncan, Washington University in St. Louis

Alyssa Hadley Dunn, Michigan State University

Richard P. Duran, University of California, Santa Barbara

Nathan Durdella, California State University, Northridge

Troy S. Duster, University of California, Berkeley

Elizabeth Dutro, University of Colorado, Boulder

Brighid Dwyer, Villanova University

Kevin Eagan, University of California, Los Angeles

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Margaret Eisenhart, University of Colorado, Boulder

Tamela Eitle, Montana State University

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Stephen Marcus Engel, Bates College

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Roger Enriquez, University of Texas at San Antonio

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Terrie Epstein, Hunter College, City University of New York

Alegra Eroy-Reveles, San Francisco State University

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Mica B. Estrada, University of California, San Francisco

Susan D. Faircloth, University of North Carolina Wilmington

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Dorothy E. Finnegan, College of William and Mary

Kara S. Finnigan, University of Rochester

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Gustavo Enrique Fischman, Arizona State University

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Terry K. Flennaugh, Michigan State University

Belinda B. Flores, University of Texas at San Antonio

Elena Flores, University of San Francisco

Henry Flores, St. Mary's University

Stella M. Flores, New York University

Nancy Foner, Hunter College, City University of New York

Karly Ford, Pennsylvania State University

Kevin Fosnacht, Indiana University Bloomington

Erica Frankenberg, Pennsylvania State University

Regina Freer, Occidental College

Sharon L. Fries-Britt, University of Maryland

Michael Fultz, University of Wisconsin-Madison

Mike Sean Funk, New York University

Celeste Marie Gagnon, Wagner College

Placida Gallegos, Fielding Graduate University

David A. Gamson, Pennsylvania State University

Patricia Gándara, University of California, Los Angeles

Herbert J. Gans, Columbia University

Liliana M. Garces, Pennsylvania State University

Gina Ann Garcia, University of Pittsburgh

Herman S. Garcia, New Mexico State University

Cynthia Teresa Garcia Coll, Carlos Albizu University

Juan C. Garibay, University of Virginia

Raymond T. Garza, University of Texas at San Antonio

Regina L. Garza Mitchell, Western Michigan University

Sarah Jane Gaskill, Indiana University Bloomington

Marybeth Gasman, University of Pennsylvania

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Chrystal A. George Mwangi, University of Massachusetts Amherst

Casey E. George-Jackson, University of Louisville

Cyril Ghosh, Wagner College

Matthew Giani, University of Illinois at Urbana-Champaign

Ryan Evely Gildersleeve, University of Denver

Gene V. Glass, Arizona State University

Phillip Atiba Goff, University of California, Los Angeles; Harvard University

Sara Goldrick-Rab, University of Wisconsin-Madison

Leslie D. Gonzales, Michigan State University

Rhonda Gonzales, University of Texas at San Antonio

Roberto G. Gonzales, Harvard University

Gabriela Gonzalez, University of Texas at San Antonio

Juan Carlos Gonzalez, California State University, Fresno

Taucia Gonzalez, University Wisconsin-Madison

Mark Anthony Gooden, University of Texas at Austin

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J. Noelani Goodyear-Kaopua, University of Hawaii at Manoa

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Cynthia Gordon da Cruz, Saint Mary's College of California

Mileidis Gort, Ohio State University

John Reed Goss, Shenandoah University

Kimberly A. Goyette, Temple University

Sandra Graham, University of California, Los Angeles

Sandy Grande, Connecticut College

Joseph Lewis Graves Jr., Joint School of Nanosciences & Nanoengineering, North Carolina A&T State University and UNC Greensboro

Judith L. Green, University of California, Santa Barbara

Preston Green, University of Connecticut

Tabitha L. Grier-Reed, University of Minnesota

Kimberly A. Griffin, University of Maryland

Jacob P. Gross, University of Louisville

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Ramona Gunter, University of Wisconsin-River Falls

Patricia Gurin, University of Michigan

Jose Angel Gutierrez, University of Texas at Arlington

Kris D. Gutiérrez, University of California, Berkeley

Linda Serra Hagedorn, Iowa State University

Kenji Hakuta, Stanford University

Sondra Hale, University of California, Los Angeles

Ronald E. Hallett, University of the Pacific

Darrick Hamilton, The New School

Craig Haney, University of California, Santa Cruz

Mark P. Hansen, University of California, Los Angeles

Maria Hantzopoulos, Vassar College

Linda Harklau, University of Georgia

Casandra E. Harper, University of Missouri

Shaun R. Harper, University of Pennsylvania

Douglas N. Harris, Tulane University

Michael S. Harris, Southern Methodist University

Frank Harris III, San Diego State University

Anthony K. Harrison, Virginia Polytechnic Institute and State University

Jeni Hart, University of Missouri

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Amy L. Hawn Nelson, University of North Carolina at Charlotte

Ray Kennard Haynes, University of Louisville

Kerry L. Haynie, Duke University

Donald Heller, Michigan State University

Jeffrey R. Henig, Columbia University

Laura Hernandez-Ehrisman, St. Edward's University

Rodney Hero, University of California, Berkeley

Jay P. Heubert, Columbia University

Edmond Raymond Hewlett, University of California, Los Angeles

Evelyn Brooks Higginbotham, Harvard University

Michiko Hikida, Ohio State University

Nicholas Hillman, University of Wisconsin-Madison

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Vivian Ho, Rice University

Jennifer L. Hochschild, Harvard University

Erika Hoffmann-Dilloway, Oberlin College

Karri Holley, University of Alabama

Jennifer Jellison Holme, University of Texas at Austin

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Grace Kyungwon Hong, University of California, Los Angeles

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Anne M. Hornak, Central Michigan University

Sonya Douglass Horsford, George Mason University

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Jessica S. Howell, The College Board

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Alvaro Huerta, California State Polytechnic University, Pomona

Luis A. Huerta, Columbia University

Bryce Edward Hughes, Montana State University

Shirley Hune, University of Washington

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Darnell M. Hunt, University of California, Los Angeles

Aida Hurtado, University of California, Santa Barbara

Sylvia Hurtado, University of California, Los Angeles

Neal H. Hutchens, Pennsylvania State University

Ashley Hutchison, University of North Dakota

William K. Ingle, University of Louisville

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Travis A. Jackson, University of Chicago

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Dimpal Jain, California State University, Northridge

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Uma M. Jayakumar, University of San Francisco

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Su Jin Gatlin Jez, California State University, Sacramento

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Tiffany Jones, Southern Education Foundation

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Kelechi A. Kalu, University of California, Riverside

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Al Kauffman, St. Mary's University School of Law

Sean Keilen, University of California, Santa Cruz

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Muhammad A. Khalifa, University of Minnesota

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William C. Kidder, University of California, Riverside

K. Jill Kiecolt, Virginia Polytechnic Institute and State University

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Fidan Ana Kurtulus, University of Massachusetts Amherst

Soo Ah Kwon, University of Illinois at Urbana-Champaign

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Taeku Lee, University of California, Berkeley

Zeus Leonardo, University of California, Berkeley

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Maxwell Leung, California College of the Arts

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R. L'Heureux Lewis-McCoy, City College of New York

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Chris Linder, University of Georgia

Jodi L. Linley, University of Iowa

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Daniel N. Lipson, State University of New York at New Paltz

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Luz Angelica Maldonado, Texas State University

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Magdalena Martinez, University of Nevada, Las Vegas

Ramon Antonio Martinez, Stanford University

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Madeline Mavrogordato, Michigan State University

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Erin McCloskey, Vassar College

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Lance T. McCready, University of San Francisco

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Linda McSpadden McNeil, Rice University

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Roslyn Arlin Mickelson, University of North Carolina at Charlotte

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Matthew Militello, East Carolina University

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Adrienne N. Milner, University of Alabama at Birmingham

Alfredo Mirande, University of California, Riverside

Gary Miron, Western Michigan University

Donald Mitchell Jr., Grand Valley State University

Dana Mitra, Pennsylvania State University

Marsha E. Modeste, Pennsylvania State University

Helene Moglen, University of California, Santa Cruz

Teboho Moja, New York University

David H. Monk, Pennsylvania State University

Helen A. Moore, University of Nebraska

Erica Morales, California State Polytechnic University, Pomona

Jose F. Moreno, California State University, Long Beach

Sandra Morgen, University of Oregon

Aldon D. Morris, Northwestern University

Ashby Morrison, Stanford University

Michele S. Moses, University of Colorado, Boulder

Yolanda T. Moses, University of California, Riverside

Suhanthie Motha, University of Washington

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Mitsu Narui, Ohio State University

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Genevieve M. Negrón-Gonzales, University of San Francisco

Thomas F. Nelson Laird, Indiana University Bloomington

Anna Neumann, Columbia University

Christopher B. Newman, University of San Diego

Z. Nicolazzo, Northern Illinois University

Tanya Nieri, University of California, Riverside

Sonia Nieto, University of Massachusetts Amherst

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Amaury Nora, University of Texas at San Antonio

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Mariela Nunez-Janes, University of North Texas

Colleen R. O'Neal, University of Maryland, College Park

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Michael A. Olivas, University of Houston

Melvin L. Oliver, University of California, Santa Barbara

Pamela E. Oliver, University of Wisconsin-Madison

Joseph Oluwole, Montclair State University

Jacqueline R. Olvera, Adelphi University

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Susan Opotow, The Graduate Center, City University of New York

Gary Orfield, University of California, Los Angeles

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Isidro D. Ortiz, San Diego State University

Leticia Oseguera, Pennsylvania State University

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Yoon Pak, University of Illinois at Urbana Champaign

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Django Paris, Michigan State University

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Rosemary J. Perez, Iowa State University

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Carlos Israel Perez Benitez, Carlos Albizu University

David Perez II, Miami University

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Daniel Perlstein, University of California, Berkeley

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Georgia A. Persons, Georgia Institute of Technology

Larry Richard Peterson, North Dakota State University

Thomas Fraser Pettigrew, University of California, Santa Cruz

Bree Picower, Montclair State University

Meghan J. Pifer, Widener University

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Jane Elizabeth Pizzolato, University of California, Los Angeles

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Rosalinda Quintanar, San José State University

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Aida Isela Ramos, University of Texas at San Antonio

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Rashawn Ray, University of Maryland

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sean f. reardon, Stanford University

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Martin D. Ruck, The Graduate Center, City University of New York

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Zack Schlesinger, University of California, Santa Cruz

Leah Schmalzbauer, Amherst College

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Marcia Texler Segal, Indiana University Southeast

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Mack Shelley, Iowa State University

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Jiannbin Lee Shiao, University of Oregon

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Gregory A. Smith, Lewis & Clark College

Sandra Susan Smith, University of California, Berkeley

Thomas Smith, University of California, Riverside

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Ron W. Solorzano, Occidental College

Doris Sommer, Harvard University

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David Omotoso Stovall, University of Illinois at Chicago

Lisa M. Stulberg, New York University

Celina Su, Brooklyn College, City University of New York

Marcelo M. Suárez-Orozco, University of California, Los Angeles

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Judy Sundayo, San Diego Mesa College

David T. Takeuchi, Boston College

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Colette M. Taylor, Seattle University

Keeanga-Yamahtta Taylor, Princeton University

Adai Tefera, Virginia Commonwealth University

La Mont Terry, Occidental College

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Scott Thomas, Claremont Graduate University

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Mara Casey Tieken, Bates College

Marta Tienda, Princeton University

William G. Tierney, University of Southern California

Daniel Tillapaugh, California Lutheran University

Carlos A. Torres, University of California, Los Angeles

Maria E. Torres-Guzman, Columbia University

Blanca Torres-Olave, Loyola University Chicago

David S. Torres-Rouff, University of California, Merced

E. Diane Torres-Velasquez, University of New Mexico

Jennifer Toth, Wagner College

Esau Tovar, Santa Monica College

Christopher Towler, Western Washington University

Van C. Tran, Columbia University

Lynda L. Tredway, Institute for Educational Leadership

Tina Trujillo, University of California, Berkeley

Anna L. Tsing, University of California, Santa Cruz

Franklin Tuitt, University of Denver

Caroline Turner, California State University, Sacramento

Cynthia Tyson, Ohio State University

Karolyn Tyson, University of North Carolina at Chapel Hill

Paul D. Umbach, North Carolina State University

Luis Urrieta, University of Texas at Austin

Concepcion M. Valadez, University of California, Los Angeles

Senon Monreal Valadez, California State University, Sacramento

Zulema Valdez, University of California, Merced

Veronica E. Valdez, University of Utah

Richard R. Valencia, University of Texas at Austin

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Robert Vargas, University of Wisconsin-Madison

Manka Varghese, University of Washington

Irene Vasquez, University of New Mexico

Olga Artemisa Vásquez, University of California, San Diego

Marissa Vasquez Urias, San Diego State University

Terah T. Venzant Chambers, Michigan State University

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Octavio Villalpando, University of Utah

Laura Villamil, University of Wisconsin-Milwaukee

Ana Maria Villegas, Montclair State University

Edward Wahesh, Villanova University

Camille Walsh, University of Washington Bothell

Natasha Warikoo, Harvard University

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Mark R. Warren, University of Massachusetts Boston

Brad Washington, University of San Francisco

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Lois Weis, University at Buffalo

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David Wellman, University of California, Santa Cruz

Kevin G. Welner, University of Colorado, Boulder

Anjale Welton, University of Illinois at Urbana-Champaign

Terrenda White, University of Colorado, Boulder

Mark J. Wiederspan, Arizona State University

Terrence G. Wiley, Arizona State University

Elizabeth A. Williams, University of Massachusetts Amherst

Jamillah Bowman Williams, Georgetown University Law Center

Joanna Lee Williams, University of Virginia

Kristin Bailey Wilson, Western Kentucky University

Maureen E. Wilson, Bowling Green State University

Terri S. Wilson, University of Colorado, Boulder

Howard A. Winant, University of California, Santa Barbara

Rachelle Winkle-Wagner, University of Wisconsin-Madison

Daniela A. Wittmann, University of Michigan

Lisa Wolf-Wendel, University of Kansas

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Janelle Wong, University of Maryland, College Park

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Erin K. Wright, University of Hawaii at Manoa

Erica K. Yamamura, Seattle University

Christine J. Yeh, University of San Francisco

David K. Yoo, University of California, Los Angeles

Tara J. Yosso, University of Michigan

John T. Yun, Michigan State University

Eboni M. Zamani-Gallaher, University of Illinois at Urbana-Champaign

Ruth Enid Zambrana, University Of Maryland

Maria Estela Zarate, California State University, Fullerton

Marjorie S. Zatz, University of California, Merced

Ana Celia Zentella, University of California, San Diego

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Sabrina Zirkel, Mills College

Mary B. Ziskin, University of Dayton

Ximena U. Zúñiga, University of Massachusetts Amherst

Richard L. Zweigenhaft, Guilford College